No. 10,749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. S. CASE, doing business as L. S. Case Company, and TRAVELERS INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and DAVID M. YOUNG,

Appellees.

BRIEF FOR APPELLANTS.

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STATEMENT OF JURISDICTION.

The libel, filed in the district court on March 4, 1943, was to review a compensation order of a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A., sec. 901 et seq. (Ap. 2-20.) The injury occurred in the district (Ap. 4) and the order was made February 12, 1943 (Ap. 5-6, 20). The district court therefore had jurisdiction of the libel. 33 U.S.C.A., sec. 921 (b). A final decree dismissing the libel and affirming the order of compensation was entered February 18, 1944.

(Ap. 31-32.) Petition for allowance of appeal to this court and order allowing the appeal were filed March 17, 1944. (Ap. 33-34.) This court therefore has jurisdiction upon appeal to review the said decree under section 128 of the Judicial Code. 28 U.S.C.A., sec. 225.

STATEMENT OF THE CASE.

The libelants were an employer and his insurance carrier. (Ap. 3-4.) The respondents were a deputy commissioner under the said Act, and an employee to whom the deputy commissioner had awarded compensation for injury. (Ap. 4.) A copy of the transcript of testimony of the hearing before the deputy commissioner (Ap. 11-17) and a copy of his findings and award (Ap. 18-20) were annexed to the libel as exhibits. These findings recited that while the employee was working as a carpenter on board the S.S. "West Portal", then undergoing repairs at Oakland, California, a foreign body entered his right eye on October 1, 1941, causing an ulcer thereof and resulting in permanent disability and serious facial disfigurement". (Ap. 18-19.) Further recitals were as follows:

> "That claimant's disability reached a permanent stage on February 19, 1942. That by reason of said injury claimant has sustained permanent partial disability consisting in loss of over 80 per cent of the sight of said eye, entitling him to compensation at $25.00 a week for 140 weeks beginning with said February 19, 1942." (Ap. 19-20.)

> "That by reason of said injury claimant has sustained, in addition to said loss of sight, serious facial and head disfigurement consisting in a large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye. That just and equitable compensation therefore is $750, which is payable forthwith." (Ap. 20.)

The compensation order conformed to the findings and was against the employer and his insurance carrier. (Ap. 20.)

By their libel to review the order, the libelants sought to set aside that part of the order awarding the employee $750 for serious facial and head disfigurement. (T. 9.) this, they alleged, was not in accordance with law and amounted to double compensation or recovery for the same injury, for the reason that the award of $25 weekly for 140 weeks for loss of eyesight exhausted all compensation to which the employee was entitled under the Longshoremen's and Harbor Workers' Compensation Act. (T. 6-7.)

Exceptions to the libel were filed by the respondent deputy commissioner. (T. 21-22.) The exceptions were sustained, the libel dismissed, and a decree entered affirming the compensation order. (T. 31-32.) An opinion was rendered in the district court. (T. 22-27.) It is reported as 52 F.S. 882. Findings of fact and conclusions of law preceded the decree. (T. 27-30.)

Succinctly stated the question involved on the appeal is purely one of law involving a construction of

the provisions of the Longshoremen's and Harbor Workers' Act, sec. 8 (33 U.S.C.A. sec. 908).

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Appellants rely upon their assigned errors Nos. II, IV, IVa, and V. (Ap. 38-40.)

ARGUMENT OF THE CASE.

A. SUMMARY.

As stated, the appeal presents only a question of law involving the construction of the Longshoremen's and Harbor Workers' Compensation Act. Through erroneous construction of the Act the deputy commissioner awarded the employee double compensation for the same injury. He awarded the employee full compensation under the Act for the loss of over 80% of the vision of an eye. Such loss, under the Act, was the same as the loss of the eye. But the deputy commissioner went further. Because of a blemish on the affected eye he awarded additional compensation to the employee in the sum of $750 for "serious facial or head disfigurement". That part of the compensation order is not in accordance with law and should be set aside. It is not in accordance with law because, under the Act, the compensation awarded the employee for loss of vision exhausted all the compensation to which he was entitled by reason of injury to the eye, or in connection there-

with. The district court confirmed the error of the deputy commissioner. It sustained exceptions to the libel and entered a decree dismissing the libel and affirming the award. The decree should be reversed with directions to the district court to enter a decree setting aside the award of $750.

B. POINTS OF LAW AND FACT.

1. **THE COMPENSATION ORDER WAS NOT IN ACCORDANCE WITH LAW IN AWARDING THE EMPLOYEE $750 FOR SERIOUS FACIAL AND HEAD DISFIGUREMENT, AND THE DEGREE AFFIRMING THE AWARD SHOULD BE REVERSED WITH DIRECTIONS TO THE DISTRICT COURT TO SET ASIDE THE AWARD OF $750.**

(a) *Assignment of Error No. IV.* (Ap. 39.) That the said Court in affirming the compensation award of respondent Warren H. Pillsbury, dated and filed the 12th day of February, 1943, directing libelants above named to pay David M. Young, as claimant, the sum of Seven Hundred Fifty ($750) Dollars forthwith for serious facial and head disfigurement, and the sum of Twenty-five ($25) Dollars a week for 95 3/7 weeks, commencing December 28th, 1942.

Appellants are mindful that compensation statutes are to be liberally construed (*Travelers Insurance Co. v. Branham,* 136 F. 2d 873, 875), but they are also mindful that with reference to the Longshoremen's and Harbor Workers' Compensation Act it was said by this court in *Marshall v. Andrew F. Mahony Co.,* 56 F. 2d 74 at page 78:

"To arrive at its proper meaning and application, section 10 (33 U.S.C.A., sec. 910) must be taken in its entirety and its true meaning be ascertained by giving due weight and consideration to all parts of the section in the light of the general aims and objects of the statute taken as a whole."

Section 8 of the said Act (33 U.S.C.A., sec. 908) lists some twenty-one different types of compensable injuries involving permanent partial disability. In pertinent part, the sections read:

"Compensation for disability shall be paid to the employee as follows: * * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability, paid in accordance with subdivision (b) of this section, and shall be paid to the employee, as follows: * * *

(5) Eye lost, one hundred and forty weeks' compensation. * * *

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye. * * *

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for the loss of the member. * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of

use of a member may be for proportionate loss of use of the member.

(20) Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed $3,500."

Turning to the findings and award of the deputy commissioner (Ap. 18-20) it will be noticed that he first found that the employee had sustained a loss "of over 80 per cent of the sight of said eye" (Ap. 19-20). Under quoted subdivision (16) of section 8 of the said Act (33 U.S.C.A., sec. 908) this was the equivalent of a finding that the employee had lost the eye and entitled the employee to the same compensation that would have been paid had the eye been removed. And such was the award. (Ap. 20.) But the deputy commissioner also found that there was a blemish on the injured eye. He found that there was a "large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye". (Ap. 20.) He found that this was a "serious facial and head disfigurement" under quoted subdivision (20) of section 8 of said Act. (33 U.S.C.A., sec. 908.) He awarded the sum of $750 for such "serious facial and head disfigurement". (Ap. 20.) If this latter award is not in accordance with law it is very obvious that it should be set aside and the decree of the district court affirming that part of the award be reversed.

Thus the question is squarely presented. Is the said Act reasonably susceptible to the construction that an

employee is entitled to additional compensation for blemish to an eye when he has been awarded the full compensation to which he was entitled had the eye been removed?

A plain reading of said section 8 (33 U.S.C.A., sec. 908) prompts a conclusion that the various subdivisions thereof are exclusive and neither cumulative nor designed to permit double recovery or compensation by an employee for compensated injury. This was the effect of the holding in *Travelers Ins. Co. v. Norton,* D.C. Pa. 1939, 30 F.S. 119. There an employee was awarded compensation equivalent to the loss of a foot. He was later awarded compensation equivalent to the loss of a leg. Upon a construction of the Act it was declared that compensation should not have exceeded the equivalent of amputation of a leg below the knee. Quoting from pages 120 and 121:

> "The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., sec. 908 (c), Subsec. (18), provides, 'Compensation for permanent total loss of use of a member shall be the same as for loss of the member.'
>
> The sense of the section is that compensation for loss of the use of a leg is to be governed by the same rules and considerations, so far as applicable, as those which govern amputation, because 'loss of the member' in this connection can mean only amputation. If it does not mean that, the clause is meaningless. There are only two ways in which a man can 'lose' a leg—he may have all or a part of it amputated, or he may suffer an injury which makes it useless. The latter condition is aptly and properly described as the

loss 'of use of' the leg. There is no third alternative. If the 'loss of the member' in Subsec. (18) does not mean amputation, the section would have to read 'Compensation for permanent total loss of the use of a member shall be the same as for the loss of the use of the member'—a nonsensical provision.

Now, Subsec. (15) of Sec. 908(c) of the Act defines the compensation payable for two different kinds or degrees of amputation of a leg—one above the knee and the other between the knee and the ankle. The framers of the Act no doubt felt, quite reasonably, that the latter (as well as the former) might in popular language be described as the loss of a leg. As a matter of fact, it is not entirely incorrect to say that a man whose leg has been amputated between the knee and ankle has lost his leg. The purpose of Subsec. (15) seems to have been to make sure that amputation of that kind would not be compensated for as loss of a leg.

The two sections are plainly intended to be considered together. Naturally, provisions governing amputations can not be applied literally to disablements in which the disabled member remains attached; but to carry out the intent of the Act, a rule can be stated which may be applied by analogy. It is that the compensation for loss of use of a member shall be fixed, in conformity with Subsec. (15), by the point at which amputation could be made without increasing the disability."

In the present case the eye injury to the employee would have attained its maximum if the eye had been removed. It may not be supposed that such removal

would improve the appearance of an employee. On the contrary, it is not entirely incorrect to say that facial disfigurement must naturally result in some measure from the removal of an eye. But there can be no doubt that in fixing compensation for the loss or removal of an eye Congress intended to exhaust the compensation for all the conditions resulting from such removal or loss. If, therefore, the removal results in disfigurement, it is not reasonable to suppose that Congress intended by subdivision 20 of the section to also compensate the employee for that resulting disfigurement. It is more to be supposed that Congress intended said subdivision 20 to cover situations where something other than the loss or removal of a member causes disfigurement. If the eye is retained in a blemished condition and the employee is awarded compensation equivalent to the loss or removal of the eye, then it inevitably follows that he has been fully compensated for any disfigurement caused by the blemished eye. That is precisely the case before the court, and that is precisely the reason why the additional award of $750 for the blemished condition should be set aside.

Research has not disclosed any federal decision directly in point, but pertinent and persuasive decisions of state courts are not lacking.

In *Brown v. State Workmen's Ins. Fund,* 200 Atl. 174, the Pennsylvania court reviewed an award under a statute providing compensation for loss of use of an eye, and also providing compensation "for serious and permanent disfigurement of the head or face of such

character as to produce an unsightly appearance". In setting aside an award for additional compensation for disfigurement, the court said:

> "The disfigurement must be such that does not normally follow the loss of that member. If compensation, in addition to the amount allowed for the loss of a member body, is denied, it is essential to show that some other part of the body is affected as a direct result of the injury.
>
> He was paid compensation for all liability whatever it may be emanating from or connected with the loss of the organ in accordance with Section 306 (c). The use of the eye having been lost and compensation paid therefor, the claimant cannot recover a second time because of its subsequent removal, as the permanent loss of the use of the eye is equivalent to its physical loss. That would be paying twice for what under the act is the same thing."

In *Milling Machinery etc. Co. v. Thomas,* 50 Pac. 2d 395, the Oklahoma court reviewed an award including compensation for disfigurement resulting from the loss of an eyeball. The court said:

> (The award for specific injury) "provides a definite number of weeks' compensation based upon his average earnings, and an award has been made therefor, such injury, though causing disfigurement, is wholly covered by the award provided by law, and that no separate award may be made for the disfigurement which results wholly from the specific injury. * * * But where there is a disfigurement arising out of the same accident and not arising wholly from the specific injury compensation may be made for the disfigurement

and also for the specific injury. And if the disfigurement as a whole includes disfigurement as a direct result of the specific injury, that part of the disfigurement is not considered in the award for disfigurement. If in this case the same accident had caused disfigurement of any part of claimant's head, hands or face other than that caused by the loss of the eye, compensation could be awarded therefor. But no allowance could be made for that part of the disfigurement caused by or resulting from the loss of the eye."

Without quoting therefrom, the following cases may be added:

Beekman v. N. Y. Evening Journal, 15 N.Y.S. 2d 671;

Freeman v. Endicott Forging & Mfg. Co., 253 N.Y.S. 597;

Madajewsku v. Susquehanna Collieries Co. (Pa.), 4 Atl. 2d 809;

Phillips v. Cox Bros. & Co. (Pa.), 5 Atl. 2d 444;

Hansen v. Dakota Trans. Co. (S.D.), 273 N.W. 261.

(b) *Assignment of Error No. II.* (Ap. 39.) That the said Court erred in sustaining the respondent, Warren H. Pillsbury's exceptions to libelant's libel and confirming the compensation order to respondent David M. Young, made and filed on the 12th day of February, 1943, and in denying the motion for injunction filed by libelant in said action.

This assignment of error was directed at the general action of the court, whereas the preceding assignment was directed at the specific action relative to the $750 complained of. What has been said in discussing the preceding assignment is also applicable here.

(c) *Assignment of Error No. IVa.* (Ap. 39-40.) That the Court erred in finding and decreeing that respondent David M. Young sustained a personal injury from a foreign body entering his right eye causing an ulcer thereof and resulting in permanent disability and serious facial disfigurement within the meaning of the terms permanent disability and serious facial disfigurement, as said terms are used and defined in the Longshoremen's and Harbor Workmen's Compensation Act.

Appellants are mindful that they were not entitled to a trial *de novo* in the district court (*Merritt-Chapman & Scott Corporation v. Bassett,* D.C. Mich. 1943, 50 F.S. 488, 489), and that the findings of the district court merely adopt and confirm the findings of the deputy commissioner. It has already been pointed out that the findings and award of the deputy commissioner are not in accordance with law to the extent of the said $750. To the same extent, therefore, the court erred in its findings and decree.

(d) *Assignment of Error No. V.* (Ap. 40.) That said Court erred in finding and decreeing that said David M. Young sustained a loss of over 80% of the sight of his right eye and in addition to said loss of sight, sustained serious facial and

head disfigurement, as said terms loss of sight and serious facial and head disfigurement are defined and used in the Longshoremen's and Harbor Workmen's Compensation Act.

This assignment is perhaps repetition, but it particularizes the error in the finding and decree of the district court. It requires no separate argument.

CONCLUSION.

For the several reasons herein stated, it is therefore respectfully submitted that the judgment herein should be reversed with directions to the district court to set aside that part of the compensation order of the deputy commissioner awarding the employee $750 for facial and head disfigurement.

Dated, San Francisco,
July 5, 1944.

R. P. WISECARVER,
Proctor for Appellants.